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THE *Washington Law Reporter* takes issue with our criticism of the Iowa case of Crow v. Brown (32 Cent. L. J. 23), where it was held that property purchased by a pensioner with his pension money is exempt from execution and sale for his debts, under Rev. Stat. U. S., § 4747, which provides that it "shall inure wholly to the benefit of the pensioner," and thinks that we have lost sight of an important rule to be applied in the construction of a statute, viz., what is the mischief which the legislature intended to remedy, arguing that inasmuch as it was settled long before the enactment of this statute, that money, whether pension money or not, due or to become due by the United States, cannot be reached by any process of the courts, until it passes out of the control of the United States or its officers, therefore the statute can have no effect unless it applies to money after it reaches the hands of the pensioner. This idea, though plausible, is not tenable, in view of the manifest and declared intention of the statute, which was to insure the protection of pension money so long as the money remains in the pension office or its agencies, or is in the course of transmission to the pensioner. The extent of the interference of the government seems to have been, simply, to insure the actual reception of its bounty by the person entitled to it, and to prevent its diversion either by the pension officer or by the pension agent, attorney or by his guardian, or in fact by any one through whom the same is transmitted, until its actual receipt by the pensioner. The "mischief which the legislature intended to remedy" undoubtedly was, not so much to prevent attachment or levy upon the fund while in the hands of the government, as to protect the fund thereafter, and until it should "inure wholly to the benefit of the pensioner." The case of United States v. Hall, 98 U. S. 343, wherein the power of congress to exempt from execution pension money after its payment to the pensioner, was referred to and doubted, but not determined, is at least conclusive upon the question here presented, as to the intention and object of the statute; for, in that case, wherein a guardian was prosecuted for embezzling his ward's pension money, it was held that the statute applied until the ward actually received the money, and the court said that these "regulations have been enacted to prevent agents, attorneys and guardians from withholding the fund until it passes into the hands of the beneficiary." And in the case of Kellogg v. Waite, 12 Allen, 530, the court held that, though the rule did not apply to the money after the same had passed into the hands of the pensioner, which question did not arise there, it was undoubtedly competent for the United States to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner. Upon principle and authority, there does not seem to be any other construction to be fairly placed on this statute, and we have no doubt whatever, in view of the language of the court in the Hall case, that, should the question come before the United States Supreme Court, as to the power of congress to exempt from execution pension money, after its actual receipt by the pensioner, it would be denied.

THOUGH the leading article in this issue does not aim to consider, at length, the general subject of the power of the State to fix railroad rates, except as controlled by legislative charters, two very late decisions bearing on the general question as to the power of the State, through its legislature or through a board of railroad commissioners, to fix maximum joint rates for railroads within the State, may be read with interest in connection therewith. The first case is Wellman v. Chicago & G.T.R. Co., wherein the Supreme Court of Michigan sustains the validity of a statute of that State, which, as construed by that court, committed to the State legislature the exclusive power of fixing reasonable maximum rates for passenger transportation by the different railroads within the State. It was contended by counsel for the railroad company, that the former decisions of the United States Supreme Court had been overruled by the decision in the case of Railroad Co. v. Minn., 10 S. C. Rep. 462, in so far as the latter held that the question as to the reasonableness of a rate, is for the court and not for the legislature. The court,

however, distinguished this case, by saying that the decision rests not on the right of the legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so; and that the substance of the decision in the Minnesota case is that whether or not the rates established by such commission are reasonable, is for the courts, and not for the commission. In other words, there is a vast difference between the action and authority of a commission appointed by the legislature, and the action and authority of the legislature itself. There are many things that a legislature can do that it cannot delegate to any other body. And it would seem that, in the opinion of the Supreme Court of the United States, this is one of them. The other case referred to is Burlington, Cedar Rapids & Northern Ry. v. The Iowa Board of Railroad Comr's, which involved the question of the right of the board to fix maximum joint rates. That body promulgated such joint rates some time ago, and the railroad company refused to adopt them, and secured an injunction against the board. The case was brought on appeal to the Iowa Supreme Court, which has rendered a decision fully sustaining the position taken by the commissioners. The decision of the court is in substance that since the State may fix the maximum charges over one road, it may extend such regulations when the shipment is over two or more roads, the object being to make reasonable rates.

THE editor of the *Albany Law Journal*, seeing that Mr. Homer Greene had an article in the January number of the *North American Review* entitled "Can Lawyers be Honest," bought a copy. He says that if he had known that the question was answered in the negative he would have tried to steal a copy. We have read the article carefully, and do not agree that the conclusion is that lawyers can not be honest. On the contrary, the writer submits a Utopian method of practice, under which, as he thinks, lawyers will find it an easy matter to be honest, though he admits that such a system would be greatly to the lawyer's worldly disadvantage. The fact is that Mr. Greene evidently does not fully comprehend the meaning of the word "honest." With him honesty means absolute, unnecessary and uncalled for frankness. In his view it is the duty of an attorney to advise his client not only as to his legal, but also as to his moral obligations. In other words, the lawyer should usurp the province, without the compensation, of the family pastor.

NOTES OF RECENT DECISIONS.

INSURANCE—ACTION ON POLICY—PROOF OF LOSS—ARBITRATION AND AWARD.—The Supreme Court of the United States in Hamilton v. Home Ins. Co., 11 S. C. Rep. 133, consider a question of appraisal and award as to the amount of loss on insured articles which, in some respects, resembles Hamilton v. Ins. Co., 136 U. S. 242. In the present case it appeared that a policy of fire insurance provided for an appraisal of each article damaged or destroyed by fire, which appraisal was to be submitted as part of the proofs of loss, and that, in case differences shall arise touching any loss or damage after proof thereof has been received, the matter shall be submitted to arbitrators, whose award in writing shall be binding on the parties as to the amount of loss. It was held that, where the company received proofs of loss from the insured, without objection either as to their form or substance, the refusal of the insured to submit to an award of arbitrators could not be pleaded in bar to an action on the policy, which did not contain any provision that no action should be maintained on it until after such award. Mr. Justice Gray, after noting the difference between this case and Hamilton v. Ins. Co., *supra*, says:

> A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in Hamilton v. Insurance Co., above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, nor necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent: and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on principal contract. Roper v. Lendon, 1 El. & El. 825; Collins v. Locke, L. R. 4 App. Cas. 674; Dawson v. Fitzgerald, 1 Exch. Div. 257; Reed v. Insurance Co., 138 Mass. 572; Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. Rep. 348; Insurance Co. v. Pulver, 126

Ill. 329, 338, 18 N. E. Rep. 804; Crossley v. Insurance Co., 27 Fed. Rep. 30. The rule of law upon the subject was well stated in Dawson v. Fitzgerald, by Sir George Jessel, M. R., who said: "There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant" "to bring an action for not referring," or (under a modern English statute) "to stay the action till there has been an arbritation." 1 Exch. Div. 260. Applying this test, it is quite clear that the separate and independent provision, in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement, and was wrongfully held by the circuit court to bar this action.

MUNICIPAL CORPORATION—STREETS—POLES AND WIRES—STREET RAILWAY—INJUNCTION. —Vice Chancellor Van Fleet's opinion in the New Jersey case of Halsey v. Rapid Transit Railway Co., 20 Atl. Rep. 859, is the latest, and one of the few decisions of courts on the modern subject of the effect of the use of streets of cities by the erection of poles and wires for electric street railways. He holds in effect that the ownership in land over which a street has been laid is, for all substantial purposes, in the public, although the owner retains the naked fee and the right of the public to use it for public travel is the primary and superior right; that the poles and wires placed in the street under legislative authority and by municipal consent, for the purpose of operating a street railway, are not an additional servitude upon the land, and an abutting land owner is not entitled to an injunction. The question whether a new use of the street is an additional burden depends upon the use made of the street and not upon the motive power. He approved of Taggart v. New York Street Railway Co., 19 Atl. Rep. 326, and distinguished between poles used for the telegraph and telephone and those used for a street railway, on the ground that the latter were intended to facilitate the use of the street as a public way.

RAILROAD COMPANY—USE OF STREETS—DAMAGES TO ABUTTING OWNERS.—The Supreme Court of Minnesota in Lamm v. Chicago, St. P. M. & O. Ry. Co., 47 N. W. Rep. 455, discuss questions of a somewhat similar nature to that in the New Jersey case above noted, viz: The right of abutting owners to damages occasioned by use of streets by railways. The court held, among other things, in effect that where a railway company unlawfully constructs its road in a public street, so as to interfere with the private rights of abutters, it constitutes a continuing trespass, for which successive suits for damages may be brought, so long as the trespass is continued until the occupation ripens into title by prescription, and that where a public street is lawfully vacated, the owner of abutting property holds the fee of the former street, presumably to the center line, discharged from all easements in favor of either the public or the owners of other property abutting in the street. The court was urged to overrule Adams v. Railway Co., 39 Minn. 286, 39 N. W. Rep. 629, which held that the owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee in the street, an easement in the street to its full width, in front of his lot, for the purposes of access, light, and air, which constitutes property, and cannot be taken from him for public use without compensation. The court in refusing so to do, says:

We are asked to reconsider and overrule our decision in the Adams Case. It is urged that it is against the great weight of authority, that a contrary view had been acted on so long in this State as to have become a practical rule of property, and that the rule laid down by us is resulting in serious consequences by way of unsettling title to much railway property, and stirring up much litigation over stale claims for damages. It is also suggested that our decision was based largely upon the authority of the Elevated Railway Cases in New York, the doctrine of which has since been held by the same court in Forbes v. Railroad Co., 24 N. E. Rep. 919, to be inapplicable to "surface roads." The decision in the Adams Case was the deliberate judgment of this court pronounced after exhaustive arguments by able counsel, and the most thorough and careful consideration of the case of which we were capable, and we have not since seen any reason for changing our opinion as then deliberately announced. The doctrine of that case must therefore be considered as the settled law of this State upon all questions involved therein, or which logically come within the principles there determined. Although its doctrine may be a step in advance of the general current of authorities, yet we believe it to be sound in principle, and eminently equitable in practice. The only serious objection to it (and we recognize its force) is the difficulty in applying the rule adopted by us as to the measure of damages. The temporary evils resulting from the adoption of the rule by way of inciting litigation or unsettled titles are, we think, much overestimated, and will soon pass away. We cited the Elevated Railway Cases because of what we deemed the

inherent force and soundness of the reasoning of the opinions of the court, although we were then, and still are, unable to see how it was consistent with the doctrine of that court, announced in other cases, that the legislature had the right to authorize the construction of a railroad on a street without requiring the railway company to pay compensation to the owners of abutting lands, provided they did not own the fee in the street. For if the abutting owner, independently of the ownership of the fee in the street, has an easement in the street in front of his lot to the full width of it for the purposes of access, light, and air, which is property, and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away or its enjoyment interfered with by a railroad constructed and operated on the surface of the ground, or at an elevation above it. As the Forbes Case is but the adherence of the court to its former decisions as to the "surface" roads, it does not render the reasoning in the Elevated Railway Cases any less persuasive to our minds than it was when we considered them in connection with the Adams Case.

NEGLIGENCE—PLEADING—WILLFUL INJURY—GROSS NEGLIGENCE.—The opinion of the Supreme Court of Mississippi, upon a rehearing in the case of Southern Express Company v. Brown, 8 South. Rep. 425, is interesting as to the distinction between willful injury and gross negligence. Cooper, J., says:

"Counsel for appellant suggests error in the opinion in this case, and supports his suggestion by the citation of two decisons of the Supreme Court of Indiana (Railroad Co. Burdge, 94 Ind. 46; and Railroad Co. v. Smith, 98 Ind. 42), and by the text of Shearman & Redfield on Negligence, in which the substance of these decisions is accepted as the law. Shortly stated, these decisions are that when, in an action to recover damages, negligence is averred, willful wrong cannot be proved; and where willful wrong is charged, negligence, however gross, cannot be proved to sustain the averment. We fail to appreciate the applicability of these decisions to the case in court. The plaintiff here has not sought to show any willful wrong; his effort was to show gross negligence. In Indiana there seems to be a broad distinction between negligence and willfulness. In Railroad Co. v. Graham, 95 Ind. 293, the court adopts the distinction in the language of Warton, that "negligence is negative in its nature, and excludes the idea of willfulness." Tested by the Indiana decisions, the instruction complained of (the fifth given for the plaintiff) is harmless, since no carelessness, however gross, could show a willful injury. But we do not construe the instruction as meaning that gross negligence may prove the intent to injure the plaintiff; its import is that carelessness may be so gross as to show that it (the carelessness), and not the injury, was willful. That this was the sense in which the instruction was intended to be read is demonstrated by the whole case. We find no error in our former opinion and adhere to it." (For former report see 7 South. Rep. 318.)

SLANDER—PRIVILEGED COMMUNICATIONS—MASTER AND SERVANT. — Whether words spoken by a master of his former servant are privileged was the main question in Fresh v. Cutter, 20 Atl. Rep. 774, decided by the Court of Appeals of Maryland. It was there held, that: 1. Where the former master of one who is about to enter the service of another, voluntarily, in good faith, without malice, in the honest belief that he is discharging a duty to his neighbor, and with a full conviction of the truth of his words, tells the new master that the servant had stolen from him, the communication is privileged. 2. Punitive damages cannot be allowed in such case without a finding of malice. 3. The speaking of such words to a person other than the new master would not be privileged, though made with a belief in their truth. McSherry, J., says:

If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly, but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion, and when this appears an exception to the general rule arises, and the words must be proved to be malicious as well as false. Beeler v. Jackson, 64 Md. 593, 2 Atl. Rep. 916. This justification from the occasion arises, in the class of cases now being considered, when a communication is "made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty," although the communication "contained criminating matter which, without the privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." Harrison v. Bush, 5 El. & Bl. 344. It seems to be generally conceded, as falling within this principle, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed that the character was given without malice, and the plaintiff, to support the action, must prove that the character was both falsely and maliciously given; and, although the statement as to the character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and knowingly stated what was untrue and injurious. Starkie, Sland. & L. 253. If, under the conditions just named, the statement be made in response to an inquiry, it would undoubtedly be privileged. Weatherston v. Hawkins, 1 Term R. 110; Child v. Affleck, 9 Barn & C. 403. But in the case at bar, it is conceded that the information was given by the appellant to Allen voluntarily, and not in response to any inquiry whatever, and this is supposed to take the case out of the privilege. It is not perceived why this circumstance should make any difference if the party has acted honestly, fairly, and without malice, though, when the information has been voluntarily given, this fact, it has been said, may in some cases have a tendency to disclose the motive of the publisher in making the publication. Townsh. Sland. & L., § 241. Without reviewing the decided cases, it may be said that the weight of authority is to the effect that the mere fact of the communication being voluntarily made does not necessarily exclude it as non-privileged communica-

tion, for a publication warranted by an occasion apparently beneficial and honest is not actionable, in the absence of express malice. Starkie, Sland. & L. 253. Or, as stated in Odger, Sland. & L. 202: "If it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B was an intimate friend or a relation of mine, and there was no other evidence of malice except that I volunteered the information, the occasion would still be privileged." Rogers v. Clifton, 3 Bos. & P. 587; Pattison v. Jones, 8 Barn. & C. 585.

EXECUTION — PURCHASE MONEY — LEVY — PRIORITIES.—The Supreme Court of Missouri, in Straus v. Sole Leather Pad Co., 14 S. W. Rep. 940, consider an interesting question as to the priority of a levy of execution for purchase money of goods over attachment. It was there laid down that under the Rev. Stat. Mo., 1879, § 2353, providing that personal property shall in all cases be subject to execution for purchase money, and shall in no case be exempt, except in the hands of an innocent purchaser for value, and without notice, a levy under an attachment for the purchase money has no priority over prior levies, the section being a statute of exemption only, and not one creating a lien or regulating priorities between creditors. After discussing the phraseology of the act, Brace, J., says:

Similar illustrations might be drawn from every branch of business and from every walk of life. Such a construction of the statute cannot be correct. There is no equity in it. The language of the act does not imperatively demand it, and the whole policy of the law on the subject forbids it; for it cannot be supposed that the legislature was with one hand laying a substantial foundation of business credit, and with the other tearing it up. It finds no support in the cases hereinbefore cited, the only color of authority found for it in them being the *obiter* of the judge in Parker v. Rodes, *supra*. In speaking of section 2353, *supra* (which did not govern in that case), the judge said that "under this statute the vendor of personal property, who had obtained a judgment against the vendee, might seize the property on execution in the hands of the purchaser thereof, with notice that the purchase price had not been paid, and it would probably authorize the vendor, under circumstances justifying a suit by attachment against the vendee, to seize such property in the hands of a third person purchasing with notice that the property had not been paid for." This *dicta* was cited, however, in State v. Mason, 96 Mo. 127, 9 S. W. Rep. 19, and in that case an attachment in favor of a vendor suing the surviving partner of a firm for the purchase money, levied upon the goods sold, was sustained as against the claim of the administrator of the partnership effects, who had taken possession of and inventoried them before the levy of the attachment, apparently solely upon its authority. And in Milling Co. v. Turner, 23 Mo. App. 103, upon the authority of the same *dicta*, a junior attachment for the purchase money was given priority over prior attachments of general creditors and in the recent case of Boyd v. Furniture Co., 38 Mo. App. 210. The St. Louis court of appeals, with apparent reluctance, held "that a levy on property under an execution, issued upon a judgment against a purchaser for the purchase price of the property, takes precedence over other prior levies on the same property;" the court in its opinion saying: "We are free to say that, if the question was one in the consideration of which we were unembarrassed by previous rulings of the supreme court, we might possibly hold that the case at bar, while strictly within the letter, is not within the spirit or equity, of the statute;" and, at the ensuing term, while adhering to the ruling in Boyd v. Furniture Co., certified this case here, stating in the opinion: "All the members of the court still feel much doubt upon the question, and, in view of the great importance to a commercial community of having the question definitely and speedily settled by the only tribunal which can finally settle it, whether this statute is a statute of priorities among creditors, or a mere statute of exemption in the case where a creditor has obtained a judgment and execution, we have concluded that we exercise our power most wisely by adhering to our former decisions, stating again the grounds thereof, and by certifying the case to the supreme court for final determination in pursuance of the constitutional mandate." Without now stopping to inquire whether the rulings of this court in State v. Mason, and that of the court of appeals in Milling Co. v. Turner, and in Boyd v. Furniture Co., are legitimate deductions from the *dicta* in Parker v. Rodes, they are evidently the fruits of it, and if we are correct in the construction we now put on section 2353, after maturely considering it on a direct issue between creditors claiming under it, holding it to be a statute of exemptions, and not one conferring a lien or priority as between creditors, it follows that the doctrine of those cases cannot stand, and they ought no longer to be held as authority on the proper construction of that section of the statute in this respect.

HOW FAR THE POWER OF A STATE OVER RAILROADS IS RESTRICTED BY LEGISLATIVE CHARTERS.

In a previous article, we discussed questions arising under the interstate commerce feature of the national constitution, as a restriction upon the rights of States to regulate railroads and railroad rates, and the authorities were reviewed upon the question as to what constitutes interstate commerce. The design of this paper is to discuss a question of kindred nature, and within the general subject of the power of States to make and regulate railroad rates, namely, how far such power is restricted or controlled by express or implied provisions in legislative charters to railroad companies. Of course, this would naturally bring up the general subject of the inviolability of legislative

charters to corporations; but as that subject is too extensive for discussion within the limits of this article, we shall confine it simply to the discussion of railroad rates, or regulation of railroads by States. It is well settled that railroad companies are carriers for hire, engaged in a public employment, affecting the public interest, and are, unless protected by their charters, subject to legislative control as to their rates of fare and freight.[1] In one case[2] it was said that it is now settled that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restricted by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. The principle laid down by the courts in the above cases, and in fact all the cases bearing on this question, is well understood and thoroughly settled; but, like most of the perplexing litigation, it is the application of the facts in each case that has caused some embarrassment, and has brought forth decisions apparently antagonistic.

The power of the State to regulate its internal affairs is well settled, and is known as the police power. In a comprehensive sense it embraces its whole system of internal regulation. Chief Justice Shaw defines the police power as "the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries or prescribe limits to its exercise."[3] Redfield, C. J., says that "this police power of the State extends to the protection of the lives, limbs, welfare, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim *sic utere tuo ut alienum non laedas*, which, being of universal application, it must, of course, be within the range of legislative action, to define the mode and manner in which every one may so use his own as not to injure others."[4] Under the powers thus inherent in every sovereignty, a State may regulate the conduct of its citizens towards each other, and when necessary for the public good, the manner in which each shall use his own property.[5] Where the owner of property devotes it to a use in which the public has an interest, to the extent of that interest the owner's use of it may be controlled by law for the common good. This question, in its application to individuals, has arisen frequently of late, with reference to the question as to the right of a State to regulate ordinary business charges, where the business is of a *quasi* public character. In the leading case,[6] the right of the legislature of the State of Illinois to fix and regulate the charges of warehouses was upheld by the Supreme Court of the United States, though one of the leading members of that court took strenuous grounds against this doctrine. The same principle was involved in the recent decision of the State of New York, involving the question as to the right of the legislature of that State to fix the charges by grain elevators, and the doctrine of the Munn case was adopted,[7] though with vigorous dissent by Judge Peckham.

It is not our intention here, however, to go at length into the subject of the regulation by the State of ordinary business charges, and whatever may be the limitations of the doctrine in its application to individuals, the principles upon which it rests acquire a peculiar force when railroads and other *quasi* public corporations are concerned. It is said that railroads have been created mainly for the accommodation of the public, and to facilitate the business of the country. Everybody, from the very exigencies of business, is compelled to patronize them. In this regard business men are left without any option. If unrestrained by wholesome legislation, the public would be very much at their mercy. It would, therefore, in

[1] C., B. & Q. R. Co. v. Iowa, 94 U. S. 155; Peik v. C. & N. W. R. Co., 94 U. S. 176; Railroad Commrs. v. R. Co., 26 Amer. & Eng. R. R. Cas. 29; Stone v. Yazoo & Miss. R. Co., 62 Miss. 607; Ill. Cent. R. Co. v. People, 95 Ill. 313; Mobile, etc. R. Co. v. Steiner, 61 Ala. 559; Beekman v. Saratoga & Schenectady R. Co., 3 Paige Ch. 75.

[2] Stone v. Farmer's L. & T. Co., 116 U. S. 307. See also Baltimore, etc. R. Co. v. Md., 21 Wall. 456; Ruggles v. Ill., etc. R. Co., 108 U. S. 531.

[3] Com. v. Alger, 7 Cush. 53.

[4] Thorpe v. Rutland & Burlington R. Co., 27 Vt. 140.

[5] Munn v. Illinois, 94 U. S. 113.

[6] Munn v. Illinois, *supra*.

[7] People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670; People v. Walsh, 22 N. E. Rep. 682.

view of these obvious possibilities, be a humiliating confession to admit that there was no reserved power either in the court or the legislature, to protect the public against such possible abuses. Every owner of property, however absolute and unqualified his title, holds it subject to the implied liability that the use thereof shall not be injurious to the public. It is on this principle, applicable alike to all kinds of property, generally denominated the police power of the State, that the authority is found for such control over individuals and corporations. And in the exercise of this reserved authority, the legislature may require railroad corporations and persons operating railroads in the State, to observe precautionary measures against accident, forbid unjust discrimination and extortionary charges, and where there is no valid contract to the contrary, prescribe a reasonable maximum of charges for the services to be performed by them.[8] Thus the right to require existing corporations to fence their track, and to make them liable for all beasts going upon it has been sustained,[9] as well as the right to regulate the grade of railways,[10] to require railroads to put up depots at junctions,[11] to regulate the speed of railways at highways and crossings.[12] The State may also make regulations requiring railways to ring the bell or blow the whistle of engines before passing highways.[13] And it has even been intimated that it might be competent for the State to make railway corporations liable as insurers for the safety of all persons carried by them, in the same manner that they are by law liable as carriers of goods; though, as Mr. Cooley says, this would seem to be pushing the police power to an extreme.[14] Thus may be understood the scope of what is called the police power of a State.

It is asserted, however, that the legislature cannot, under the pretense of regulation, deprive a corporation of any of its essential rights and privileges. The limit to the exercise of the police power in these cases is said to be, that the regulations must have reference to the comfort, safety or welfare of society. They must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.[15] The rules prescribed and the power exerted must be within the police power in fact. But it may be considered as now settled that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.[16] At the same time, it is unquestionable that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies, as carriers of persons and goods, to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition;[17] but with the limita-

[8] Louisville, etc. R. Co. v. Railroad Commission, 19 Fed. Rep. 679.

[9] Thorpe v. Rutland & Burlington R. Co., 27 Vt. 140; New Albany & New Salem R. Co. v. Tilton, 12 Ind. 3; Same v. Maiden, 12 Ind. 10; Same v. McNamara, 11 Ind. 543; Ohio & Mississippi R. Co. v. McClelland, 25 Ill. 140; Madison & Indianapolis R. Co. v. Whiteneck, 8 Ind. 217; Indianapolis & Cincinnati R. Co. v. Townsend, 10 Ind. 38; Same v. Kercheval, 16 Ind. 84; Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42; Horn v. Atlantic & St. Lawrence R. Co., 35 N. H. 169, and 36 N. H. 440; Fawcett v. York & North Midland R. Co., 15 Jur. 173; Smith v. Eastern R. Co., 35 N. H. 356; Bulkley v. N. Y. & N. H. R. Co., 27 Conn. 479; Jones v. Galena, etc. R. Co., 16 Iowa, 6; Winona, etc. R. Co. v. Waldron, 11 Minn. 515; Bradley v. Buffalo, etc. R. Co., 34 N. Y. 829; Sawyer v. Vermont, etc. R. Co., 105 Mass. 196; Penn. R. Co. v. Riblet, 66 Pa. St. 164; s. c., 5 Am. Rep. 360; Kansas Pacific R. Co. v. Mower, 16 Kan. 573; Wilder v. Maine Central R. Co., 65 Me. 332; Blewett v. Wyandotte, etc. R. Co., 72 Mo. 583.

[10] Fitchburg R. Co. v. Grand Junction R. Co., 1 Allen, 552; Pittsburg, etc. R. Co. v. S. W. Pa. R. Co., 77 Pa. St. 173.

[11] State v. Wabash, etc. R. Co., 83 Mo. 144.

[12] Rockford, etc. R. Co. v. Hillmer, 72 Ill. 235.

[13] Galena & Chicago R. Co. v. Loomis, 13 Ill. 548. And see Bulkley v. N. Y. & N. H. R. Co., 24 Conn. 486; Veazie v. Mayo, 45 Me. 560; Clark's Admrs. v. Hannibal & N. W. R. Co., 36 Mo. 202.

[14] Cooley on Constitutional Limitations (6th Ed.) 715; Thorpe v. Rutland & Burlington R. Co., *supra*.

[15] Washington Bridge Co. v. State, 18 Conn. 53; Bailey v. Philadelphia, etc. R. Co., 4 Harr. 389; State v. Noyes 47 Me. 189; Pingry v. Washburn, 1 Aiken, 264; Miller v. N. Y. & Erie R. Co., 21 Barb. 513; People v. Jackson & Mich. Plank Road Co., 9 Mich. 285, 307; Sloan v. Pacific R. Co., 61 Mo. 24; Atty.-Genl. v. Chicago, etc. R. Co., 35 Wis. 425.

[16] Stone v. Farmer's L. & T. Co., *supra*.

[17] Cooley on Constitutional Limitations (6th Ed.), 716. Thus it had been held that a statute providing that engineers and other railroad employees shall be

tion that such power must be exercised within the purview of the constitution of the United States, which forbids the State passing any law impairing the obligation of contracts. Charters of incorporation which are granted for the private benefit or purposes of the incorporators, have been held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them.[18] And the grant of the franchise can no more be taken away by the legislature, or its benefits diminished or impaired, without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.[19] It will thus be seen that the police power of a State to regulate the charges or business of a railroad company seems, to some extent, restrained by the grant of privileges given in its charter. It has been held, however, that this power of regulation, at least in so far as common carriers are concerned, is a power of government continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent, and if there is reasonable doubt, it must be resolved in favor of the existence of the power. Indeed, it has been intimated in able opinions, that the police power of a State cannot be alienated even by express grant;[20] and that when the regulation of their own internal affairs is given to railroads, to be carried into effect by their police and other regulations, it is always subject to the superior control of the legislature.[21] To what extent this doctrine of the inability of a State to make an express grant of its police power, or at least to disable itself from the interference with chartered rights by regulatory measures, may be established in the case of ordinary corporations,[22] the cases bear out the conclusion that in the case of common carriers there is now hardly a limit to legislative control. Thus, where the power has been absolutely given in express terms to fix their charges, though the tendency on the part of some of the earlier decisions was to consider such power as not subject to interference thereafter by the State,[23] the doctrine seems now to be firmly established, that the power of a railroad company to fix its charges is limited by the rules of the common law, which requires all charges to be reasonsble;[24] that charter authority to fix, regulate and receive charges, does not amount to a contract of exemption;[25] that where a charter granted to a railroad company authorizes the fixing of such charges, there is annexed to such grant the implied condition that the tolls and charges fixed shall be reasonable, and the legislature retains the power to secure, through

examined by a medical board with reference to fitness and to color blindness is constitutional. Smith v. Alabama, 124 U. S. 465; McDonald v. State, 81 Ala. 279; Nashville, etc. R. Co. v. State, 28 Cent. L. J. 64.

[18] Slaughter-house Cases, 16 Wall. 36.

[19] Dartmouth College v. Woodward, 4 Wheat. 518; Piqua Bank v. Knopp, 16 How. 369; State v. Noyes, 47 Me. 189; Com. v. Erie & W. Transp. Co., 107 Pa. St. 112; Pa. R. Co. v. Baltimore, etc. R. Co., 60 Md. 263; Houston & T. C. R. Co. v. Texas & Pac. R. Co., 70 Tex. 649.

[20] Stone v. Farmer's L. & T. Co., *supra;* Thorpe v. R. & B. R. Co., *supra;* Butcher's Union Co. v. Crescent City Co., 111 U. S. 750.

[21] Thorpe v. R. & B. R. Co., *supra.*

[22] For instance, it has been repeatedly held that the grant given by a legislature to gas-light companies, or water companies, of exclusive privileges, or to fix its own charges, is an irrepealable contract, subject to no interference by the legislature. New Orleans Gas-Light Co. v. Louisiana Gas-Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizen's Gas Co., 115 U. S. 683; State v. Laclede Gas-Light Co. (Mo.), 14 S. W. Rep. 974; New Orleans Water Works v. Rivers, 115 U. S. 674; Citizen's Water Co. v. Brideport, etc. Co., 55 Conn. 1.

[23] See Thorpe v. R. & B. R. Co., *supra*, where the court simply confirmed power in the legislature to regulate fencing by railroads, and admitted that the privilege of operating the road, or taking tolls or freight or fare, is the essential franchise conferred, and that any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would, no doubt, be void. See also Derby Turnpike Co. v. Parks, 27 Amer. Dec. 700, where it was held that a legislative grant to an existing turnpike corporation of the right to fix its tolls is a contract, and cannot be repealed. So in P. W. & B. R. Co. v. Bower, 13 Amer. L. Reg. 174, an act prohibiting railroad companies from discriminating in its charges was held void, as not being within the police power of the State. And it was said that acts regulating mode of carriage of passengers, regulating speed of trains, or prescribing precautions for public safety at crossings, or requiring the erection of fences, are proper exercises of police regulations. Such acts leave the franchise unimpaired, and simply regulate the exercise of it, in some particulars, plainly essential to the general health, safety or comfort of society. But quite different are acts which directly touch the constitution of the corporation, or abridge or modify any of these incorporated powers which are essential to the very ends of its creation. Such powers, for example, as the right to operate a railroad at all, the right to take tolls, or fares, or freights, or to adjust their tariff of such charges. See, also, Vermont & Mass. R. Co. v. Fitchburg R. Co., 9 Cush. 369; Fitchburg R. Co. v. Gage, 12 Gray, 393.

[24] Stone v. Farmer's, etc. Co., *supra;* C., B. & Q. R. Co. v. Iowa, 94 U. S. 165.

[25] Stone v. Yazoo, etc. R. Co., 62 Miss. 607.

a commission, conformity by the company to the standard of reasonableness in its rates;[26] that where express power is given to a board of directors of a railroad company to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, inasmuch as the power to establish rates is to be exercised through by-laws, and the power to make by-laws was restricted to such as should not be repugnant to the laws of the State, the charter does not release the company from restrictions upon the amount of rates contained in general and special statutes.[27] In another case, where a charter provided that a company "shall be bound to carry freight and passengers upon reasonable terms," it was held that this did not limit the power of the State to regulate the rates of charge.[28] And so, also, where a carrier's charter contains a provision that the company may establish such rates of fare and freight as it may deem reasonable, or all such rates as do not exceed a certain maximum, although the question has arisen whether the grant of such a privilege constitutes a contract, leaving to the carrier the adjustment of charges unrestricted by other limitations than that they shall be either reasonable or within the maximum; and although upon that question there has been some conflict of authority,[29] the strong current of decisions is to the effect that a State is still left free to act on the subject of whether the rates are reasonable, and that the common law doctrine that all rates should be reasonable will be read into the charter.[30] And where a charter of a company named a maximum of charges which should not be exceeded, it was held that this does not constitute a contract with the company, that it may charge whatever rates it chooses within the maximum, and that the company is therefore subject to subsequent legislation regulating railroad tariffs,[31] and a franchise to take less tolls, as the company shall think reasonable, does not vest an absolute discretion in the corporation, but the courts have authority to limit the right to reasonable tolls.[32] And though in some cases there are *dicta* that where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the legislature afterwards to interfere can be denied, no cases can be found wherein the power to regulate the tolls and charges of a railroad company, in derogation of the terms of its charter, has been actually denied or restricted. And the broad proposition may be asserted, in view of the authorities, that as a matter of fact, railroad companies and common carriers are at all times, without reference to their legislative charters, subject to control and regulation in the direction of reasonable rates and charges, and that no language of its charter will relieve such company from its duty to make its rates reasonable.[33] Of course this statement is subject to the qualification, well established, that the power to regulate is not a power to destroy, and that limitation is not the equivalent of confiscation; and that, under the pretense of regulating charges, the State cannot require a railroad company to carry without reward.[34] This was the substance of the last utterance of the Supreme Court of the United States in what is known as the "Granger Case,[35] which is the first direct declaration of that court that, although railroads are at all times as to their rates subject to regulation by the State, this power is so far limited that such regulation and rates of freight must be reasonable, and that common carriers cannot be compelled to haul freight for less than a fair compensation, and that what is a fair compen-

[26] Stone v. N. J. & C. R. Co., 62 Miss. 646.

[27] Ruggles v. Illinois, 108 U. S. 526; Illinois Central R. Co. v. Illinois, 108 U. S. 541.

[28] Winona & St. Peter R. Co. v. Blake, 19 Minn. 418.

[29] See cases cited in note 23.

[30] Stone v. Farmer's, etc., R. Co. *supra;* Munn v. C., B. & Q. R. Co. 94 U. S. 113; C., B. & Q. R. Co. v. Iowa' 94 U. S. 155.

[31] Georgia Railroad & Banking Co. v. Smith, 35 Amer. Eng. R. R. Cas. 511; Georgia Railroad & Banking Co. v. Smith, 70 Ga. 694; Transp. Co. v. Sweetzer, 25 W. Va. 434. But this is denied in Stone v. Natchez, ackson & Columbia R. Co., *supra*.

[32] Attorney General v. Railroad Co., 35 Wis. 426.

[33] This statement, and the tendency of decisions to ignore the provisions of legislative charters to railroads, is well illustrated by the late Missouri case of Sloan v. Pac. R. R., 61 Mo. 24, where the court aimed and pretended to follow Phil., W. & B. R. R. Co. v. Bowen, *supra*, which (see note 23), is one of the earlier cases conceding to railroad companies possessing unequivocal franchises, power to adjust and fix their own charges, free from legislative control. But the effect of the decision by the Missouri court was practically annulled by the further holding that even such railroad companies were bound by their common law duties to make reasonable rates.

[34] Stone v. Farmer's L. & T. Co. *supra;* Miller v. New York & Erie R. Co., 21 Barb. 219; Stone v. Natchez, Jackson & Columbia R. Co. *supra*.

[35] C. M. & St. P. R. Co. v. Minn., 134 U. S. 418.

sation is for the courts, and not for the legislature to determine; which decision is, in so far, so much of aconcession to railroad rights as to put it out of the power of a legislature to fix rates which are in effect ruinous and unreasonable.[36] LYNE S. METCALFE, JR.

[36] See on the general subject, the late case of Wellman v. Chicago & G. T. T. Ry. Co. (Mich.), 47 N. W. Rep. 489, where the Supreme Court of Michigan held constitutional an act fixing maximum rates of passenger fares upon railroads in that State.

CONTRACTS IN RESTRAINT OF TRADE.

WESTERN WOODEN-WARE ASS'N V. STARKEY.

Supreme Court of Michigan, Dec. 24, 1890.

1. In deciding whether a contract is in restraint of trade and void, it is the duty of the court to see that the public interests are not in any manner jeopardized, and its decision will depend upon the situation of the parties, the nature of the business, the interests to be protected by the restrictions, and its effect on the public.

2. A contract, whereby a domestic firm sells out its manufacturing business and agrees not to engage therein in that and neighboring States for five years, and not to allow its real estate, whereon its factory is situated, to be used for such business for the same period, as it evidently contemplates the cessation of the business conducted by that firm, is void as being in restraint of trade.

LONG, J.: The bill in this cause is filed for the purpose of having the defendants Starkey, Ferris, and Olmsted enjoined from engaging in the business of manufacturing pails, tubs, and other articles of wooden-ware during the period of five years, from the 29th day of June, A. D. 1888; to enjoin the other defendants from carrying on that business with them; to enjoin all the defendants from using certain premises in the village of St. Louis, Gratiot county, for the purpose of manufacturing tubs, pails, etc. The bill asks for an accounting touching complainant's damages, for a decree requiring the same to be paid, and there is also a prayer for general relief. The bill shows that the complainant is a corporation organized under the laws of the State of Illinois for the purpose of carrying on the business of manufacturing, buying, and selling wooden-ware, and the materials which enter into wooden-ware; that it was engaged in the business prior to June 29, 1888; that on that date the defendants Starkey, Ferris, and Olmsted were doing business at St. Louis as partners under the name of the St. Louis Wooden-Ware Company; that they were engaged in business similar to that of complainant, and owned and occupied certain premises, with a manufacturing establishment, and were possessed of a large quantity of manufactured articles, materials, tools, and other chattels used in their business; that on that date the complainant and the members of said copartnership entered into a contract which is attached to the bill, the material parts which will be referred to. By this contract, the firm, in consideration of $6,000, agree to sell to the complainant their stock on hand, materials, tools, implements, and chattels. The contract contains this clause: "And the said first parties also agree not to become engaged in the manufacture of tubs and pails during the next five years in the States of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana, and Ohio, or allow their property at St. Louis, Mich., to be used for that purpose, nor to sell said property to any one for that business, except by consent of said second parties; and in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party $2,000 for damages, for violating this contract." The contract also contains certain other provisions not necessary here to be noticed. After making the contract the complainant paid the copartnership the $6,000, and received the chattels. The defendants Starkey, Ferris, and Olmsted violated the contract in that they are now engaged in the manufacturing and selling wooden-ware in the premises in question, and, as the bill alleges, have confederated with the other defendants Palmerton, Fowler, and Newman to carry on the business with them, and, for the purpose of concealing their transactions, procured the defendants Palmerton, Fowler, and Newman to organize a corporation under the name of F. G. Palmerton Wooden-Ware Company, Limited, with intent to engage in said business. The bill further charges that the defendant Starkey pretended to convey the lands in question to his son-in-law Palmerton; that Palmerton has conveyed them to the Palmerton Wooden-Ware Company, and that the business of manufacturing wooden-ware has been carried on in said premises by the Palmerton Wooden-Ware Company; that the defendants Starkey and Ferris have active supervision, control, and management of said corporation, and have been making sales of their pails and tubs in all the States of Michigan, Wisconsin, Illinois, Iowa, Missouri, Indiana, and Ohio. The bill charges that the corporation so organized by the defendants is a mere pretense and cover procured to be organized by the defendants Starkey and Ferris; that Starkey and Ferris furnish the capital therefor; that the stock of the corporation is held for their benefit and advantage; that the breach of the contract on the part of the defendant has greatly injured and damnified the complainant. To this bill the defendants filed a general demurrer, which the circuit judge sustained; and on the 14th day of March, 1890, entered a decree dismissing the bill. From this decree complainant appeals.

Complainant's counsel raised but three questions in this court: (1) That the clause of the contract wherein the defendants Starkey, Ferris,

and Olmsted agree not to become or engage in the manufacture of tubs, etc., during the next five years, in any of the eight States named, or permit the premises in question to be used for that purpose, without the consent of the complainant, is valid; (2) that the clause of the contract which provides "in case of any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party $2,000 for damages for violating this contract," does not preclude the complainant seeking relief by injunction; (3) that Act No. 225 of the Public Acts of 1889, declaring certain contracts, agreements undertakings, and combinations unlawful, and to provide punishment for those who shall enter into the same, or do any act in the furtherance thereof, has no application in this case.

Counsel for complainant contends, under his first proposition, that this covenant is limited in respect to time; that it is also limited in regard to territory—that is, to Michigan and in the seven other States named; that it is a covenant embodied in the contract, of which contract the defendants Starkey, Ferris, and Olmsted sell certain property, the price is being fixed at one sum both for the value of the property and for the covenant; that how much of this price applicable to the property sold, and how much to the covenant not to engage in business, neither the contract nor the circumstances enable us to say; but that it would be presumed that, by reason of the covenant, a larger price was paid by the complainant than would be necessary merely to cover the value of the property sold. Counsel insists that this question has been settled decisively by this court, and, in support of that proposition, counsel cites Hubbard v. Miller, 27 Mich. 15; Beal v. Chase, 31 Mich. 490. Counsel also contends that the rule laid down in Beal v. Chase, *supra*, is approved; also in Doty v. Martin, 32 Mich. 462; Caswell v. Gibbs, 33 Mich. 331; Grow v. Seligman, 47 Mich. 610, 11 N. W. Rep. 404; Watrous v. Allen, 57 Mich. 366, 24 N. W. Rep. 104.

From the view we take of this case, we need discuss but one question. The contract must be declared void on the ground of public policy. The case cited by counsel for defendant do not sustain the doctrine he contends for here. This case does not fall within that class of cases where contracts have been upheld though the parties, by the contract, were to abstain from carrying on the same business for a particular length of time, and within a designated territory. In Hubbard v. Miller, *supra*, the complainant was engaged in carrying on the business of a general retail hardware store, in the city of Grand Haven, including the tubing and all necessary apparatus and tools for sinking drive-wells, and was also carrying on the business of putting down drive-wells. Two of the defendants, Miller and Decker, partners under the firm name of George W. Miller & Co., kept a hardware store in the same city and like the complainant kept on hand the tubing and other materials used in putting down such wells, and were also engaged in putting them down for those who choose to employ them. Complainants purchased the stock, tools, etc., of the defendants Miller & Decker, and paid their price on condition that they would cease to do that kind of business, and would not keep well-drives, tools, and fixtures. The defendants violated this contract. The firm of George W. Miller & Co. was dissolved, and afterwards reorganized, with the defendant Akeley as a member of the firm. The new firm shortly after went into business, and kept the same kind of tools and materials as complainant, and carried on the well-driving business. Defendant Decker went into business for himself and also carried the same line of stock, and commenced putting down drive-wells. It is true that this court, on the hearing here, granted a perpetual injunction. But Chief Justice Christiancy, who wrote the opinion in the case said: "Whether such contracts can be supported or not, depends upon the matters outside of and beyond the abstract fact of the contract or the pecuniary consideration. It will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restrictions, its effect upon the public; in short, all the surrounding circumstances, and the weight or effect to be given to these circumstances, is not to be affected by any presumption for or against the validity of these restrictions. If reasonable and just, the restriction will be sustained; if not, it will be held void. The court construed this contract as limited to the city of Grand Haven and vicinity. It will be noticed that the circumstances surrounding that case and the situation of the parties show that the complainant purchased a business which was similar to the one in which he was then carrying on and which he continued to carry on thereafter in the same place. The public may have been as well served by this means as though the two or three firms continued the business. In Beal v. Chase, 31 Mich. 490, to which the learned counsel refers as sustaining his position, it appears that Chase was the publisher of a receipt-book, and carried on the business of printing. Chase sold to Beal his printing establishment, the receipt-book and copyrights, the good-will of the business, and the right to use the name of Dr. Chase in connection with the book and business, and agreed not to engage in the business of printing and publishing in the State of Michigan, so long as Beal remained in the printing and publishing business at Ann Arbor. The whole business was turned over to Beal, and he was to fulfill all contracts entered into by Dr. Chase and was to furnish the paper, the "Courier and Visitant," to all subscribers, etc. It appears that the business was to be carried on as Chase had carried it on, and the property purchased was devoted to the business in which it had theretofore been used. It was not, like the present case, closed up and taken out of the channels of business, and the court upheld and

enforced the contract which the parties themselves had made. The complainant here is a corporation organized and existing under the laws of the State of Illinois, and having its place of business in Chicago. It is alleged in the bill that they are engaged in the business of manufacturing, buying and selling pails, tubs, and other articles of wooden-ware, and manufacturing, buying, and selling staves, heading, hoops, and other articles of wooden-ware; also for the owning and operating machinery, tools, and implements connected with and used in the manufacture of pails, tubs, and other articles of wooden-ware; that it sells products in the eight great States named. It is not alleged by the bill that, in the making of the contract the complainant intended to take the business and good-will of Starkey, Ferris, and Olmsted, and carry on the the business of manufacturing these articles in this State; but, from the terms of the contract, it is manifest that they not only intended to take these parties out of the manufacturing business, but to ship the machinery which was used for that purpose out of the State, and close the doors of the shops. Complainant did not purchase the realty. It purchased all the machinery there in use, and the contract shows that it was to be taken down and placed on board the cars. The interests of the parties alone are not the sole considerations involved here. It is the duty of the court to see that the public interests are not in any manner jeopardized. The State has the welfare of all its citizens in keeping, and the public interest is the pole-star to all judicial inquiries.

Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment, and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the State. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other States of the great northwest teeming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris, and Olmsted, and shut the doors of that shop, and prohibit their again opening them for five years in any one of those States, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the State, and in the other seven States, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor sell it to any one for that business, except by consent of the complainant, and this under a penalty of $2,000. A somewhat similar question arose in Wright v. Ryder, reported in 36 Cal. 342. There a contract had been entered into for the purchase by the Oregon Steam Navigation Company of the California Steam Navigation Company of a steam-boat called the "New World," far the sum of $75,000, and also an agreement by the Oregon Steam Navigation Company that the steam-boat should not be run upon any of the routes of travel on the rivers, bays, or waters of the State of California, for the period of 10 years thereafter. The validity of this contract was before the court, it being claimed that it was held void, on the ground of public policy and it was held void, the court there saying: "If the California Steam Navigation Company, which now occupies our bays, rivers, and inlets with its fleet of steam-boats, should suddenly convey them all to a purchaser on condition that they were not to be employed in navigating any of the waters of this State for a period of 10 years, no one could doubt that this would operate as a great present calamity to the public, and the condition would be void as a restraint upon trade. On the other hand, if a sloop or schooner of 50 tons burden should be sold on a similar condition, the injury to the public would be scarcely appreciable. In like manner, if all the carpenters and masons in a large city should bind themselves not to prosecute their business in this State for a period of 10 years, it might produce great public inconvenience; whereas, if only one carpenter or mason should enter into a similar contract, the loss of his service might not be felt by the public. And yet, in the latter case, we should be bound by a long line of adjudications in England and America to hold the contract void in restraint of trade."

In the present case, the defendants Starkey, Ferris, and Olmsted were not only to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts, and held void as unreasonable restraints of trade, and therefore void on the ground of public policy. The decree of the court below must be affirmed, with costs. The other justices concurred.

NOTE.—It is evident that the decision in the principal case is based on the effect of the contract in destroying a certain kind of business, which would throw a large number of people out of employment, and on the idea that the public interest required that the vendor should be at liberty to re-engage in that business, in order that such discharged employees might not be injured in their efforts to earn a livelihood. In Alger v. Thacher, 19 Pick. 51, it is said that among the most ancient rules of common law is found the rule that bonds in restraint of trade are void. As early as 1415 the year books say this is old and settled law. This general rule has from time to time been modified,

but the principle has always been regarded as important and salutary. After a time a distinction was made between a general and a limited restraint of trade. The former was held to be void. When such contract was limited as to time, place or persons, it was considered ts be valid. The doctrine extends to all branches of trade and to all kinds of business.

The reasons given for the rule are that such contracts injure the parties, depriving them of the means of livelihood and for the support of their families, and subject them to imposition and oppression, deprive the public of the services of people in callings where they are most useful, discourage industry and enterprise, and diminish the products of ingenuity and skill, prevent competition and enhance prices, and tend to produce monopolies, especially by large corporations. In that decision a contract not to carry on the trade of an iron founder, without limitation as to time or place, was considered to be void. It is not considered objectionable, that the restraint is unlimited as to time, provided it is limited as to locality. In such case the party can go elsewhere, and the fact that the vendee can sell the good-will, if necessary, no doubt will enable the vendor to obtain a better price. 27 Cent. L. J. 527 and note. An agreement to withdraw from the ice business in a certain town was considered to be valid. Handforth v. Jackson, 150 Mass. 149. In the sale of land a covenant may be imposed, that no trading nor mercantile business shall be established thereon. Morris v. Tuscaloosa M. Co., 83 Ala. 565. Where a party, engaged in shipping sand from a piece of land, sold a part of it with a contract that no sand should be sold therefrom, such provision was considered to be valid, because it imposed no restriction on one party which was not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it. Hodge v. Sloan, 107 N. Y. 244. An agreement not to sell a certain kind of goods to any other person in that town was enforced. Keith v. Hirschberg O. Co., 48 Ark. 138; Newell v. Meyendorff, 9 Mont. 254. An agreement not to engage in a certain business for five years was considered to be void, because there was no limitation as to locality. Bishop v. Palmer, 146 Mass. 469. Where a contract not to engage in a certain occupation was unlimited as to locality, but was admitted by the pleadings to refer only to a certain business, which itself was admitted to be confined to a certain area, the court enforced it as being limited as to locality. Moore, etc. Co. v. Towers, etc. Co., 87 Ala. 206. On the prihciple that such a limitation as to locality is good, a provision in a deed to real estate, that no intoxicating liquors were to be sold on said premises in less quantities than five gallons, was sustained. Sutton v. Head, 86 Ky. 156. It has often been held that such restriction is unlimited when it extends to the whole kingdom or State. State v. Nebraska D. Co. (Neb.), 46 N. W. Rep. 155. Other courts have looked more to the protection of the vendee, and have been willing to sustain such contracts in restraint of trade, if they were necessary for his protection. Mandeville v. Harmon, 42 N. J. Eq. 185; Washburne v. Dosch, 68 Wis. 436. A party sold out his interest in certain sand-papering machines, and covenanted not to manufacture, sell or cause to be sold, any sand-papering machines of any description. This covenant was considered to be void, because it was not necessary to protect the covenantee. The covenantee's business was only in the United States, yet the restriction extended to the whole world. The covenantor was prevented from making any sand-machines, though he might invent or make such as did not interfere with the covenantee. Berlin M. Works v. Perry, 71 Wis. 495. In a bill to enforce a contract not to engage in the manufacture of thermometers for ten years anywhere in the United States, the complainant alleged that it was necessary for his protection that he should have no competition throughout this country, since his business extended to all parts of it, and that he required ten years to firmly establish it; the court on demurrer considered the contract enforceable, as necessary to his protection. Watertown T. Co. v. Pool, 51 Hun, 157. In another case the court considered it no objection that the restraint was general, when the interest to be protected was equally general. If a business extends over a continent, why should the owner not be allowed to make a stipulation for restraint as extensive as the business? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If, said Sir George Jessel, in Printing Co. v. Sampson, L. R. 19 Eq. 472, there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and enforced by the courts. In that case, a contract not to sell or manufacture for 99 years in the United Stases, except in Nevada or Montana, friction matches, was sustained. Diamond Match Co. v. Roeber, 106 N. Y. 473. In many other cases the interest of the public is more considered than the protection of the covenantee. In fact it is maintained that public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be maintained. Fowle v. Parke, 131 U. S. 88. It is said that all such contracts must be reasonable (27 Cent. L. J. 527 and note; 4 Han. Law R. 128), but by reasonableness is now meant proper protection of the public and of the covenantee. Consequently all contracts which have a palpable tendency to stifle competition, whether in the market value of commodities or in their carriage and transportation, such as the agreements between two railroads to divide their earnings from traffic between two given points, for which they were previously competitors, are void. Texas, etc. R. R. v. Southern Pac. R. R. (La.), 6 South. Rep. 888. A contract, that A shall furnish so much lumber to B at a certain price, and shall pay B a certain very high price for all the lumber A sells to others, is void, when it is shown that B made similar contracts with all other lumber men in that district, for the sole purpose of increasing the price, limiting the supply and controlling the market. Santa Clara, etc. Co. v. Hayes, 76 Cal. 387. A contract between the only two boats on a line to pool their net profits in a certain proportion was declared invalid, since it tended to prevent competition. The combination or agreement, whether or not in the particular instance it has the desired effect, is void, because of public policy. Anderson v. Jett (Ky.), 12 S. W. Rep. 670. A contract with an unincorporated company, of which ninety-five per cent. of the manufacturers of star candles in the United States, excluding the country west of the Rocky Mountains, were members, formed to increase prices and diminish the manufacture of such candles, was held to be void, said contract being in furtherance of those objects. Emery v. Ohio Candle Co. (Ohio), 24 N. E. Rep. 600. A contract, conveying a distillery to certain parties in furtherance of an effort to create a monopoly and destroy competition by

concentrating the distilleries of the country in their hands, and by shutting down and dismantling a number of them, was declared to be void. State v. Nebraska D. Co. (Neb.), 46 N. W. Rep. 155. For the same reasons a contract was declared to be void, which was in furtherance of a scheme to buy up all the match factories in the country, to lease those that could not be bought, and to contract with the vendors not to engage again in such business for ten years. Richardson v. Buhl, 77 Mich. 632. Contracts, however, which tended to limit the production of certain articles were upheld, when such articles were not articles of prime necessity, merchandise nor staple commodities, and no conspiracy to raise prices shown. Central S. R. Co. v. Cushman, 143 Mass. 353; Dolph v. Troy, etc. Co., 28 Fed. Rep. 553. The object in all these cases is to protect the public, consequently all contracts creating monopolies in patents or in trade secrets are sustained, because the vendors already have a monopoly, and it is a matter of indifference to the public as to who is the monopolist. Fowle v. Park, 131 U. S. 88; Vickery v. Welsh, 19 Pick. 523; Good v. Deland, 121 N. Y. 1; Tode v. Gross, 4 N. Y. Sup. 402; Bowling v. Taylor, 40 Fed. Rep. 404; Central S. R. Co. v. Cushman, 143 Mass. 353. Owing to the present tendencies it may be expected that for some time the decisions on such contracts will be directed to the overthrow of attempted monopolies.

S. S. MERRILL.

CORRESPONDENCE.

ADVERSE POSSESSION AND DISSEISIN BY MISTAKE.

To the Editor of the Central Law Journal:

In your issue of February 13, an article is contained, entitled "Disseisin and Adverse Possession," written by A. Hollingsworth, Keokuk, Iowa. The entire article is based upon the supposition that "intent to claim adversely being a necessary element, disseisin cannot be committed by mistake." And in taking this position, the author of that article ignores a distinct line of decisions directly to the contrary, which are based upon a better reason and a better authority. I would not call your attention to this fact, excepting that the author of that article has failed to notice this line of decisions, that are directly opposed to the decisions cited by him, thus leaving the impression to be gathered from the article, that it was well settled that the intent was the necessary element to be considered by a disseisin. I will cite you to the case of Yetzer v. Thoman, 17 Ohio St. 130. This question of intent arose directly in this case. The court, in the trial of the case in the common pleas, charged "if a land owner through ignorance, mistake or inadvertency, includes a part of an adjoining tract within his inclosure, and it so remains inclosed for twenty-one years, it does not operate as a disseisin. A disseisin cannot be committed by mistake, because the intention of the possessor to claim adversely is an essential ingredient in a disseisin; nor will mere mistake work an abandonment of land, nor make a good possessory of title."

The court also charge: "The plaintiff must have knowingly and designedly taken and held the land to enable him to claim the benefit of the statute. Occupancy by accident, or mistake, or ignorance of the dividing line is not sufficient."

The Supreme Court of Ohio, in this case, say: "We are of opinion that this charge is erroneous. We think that under our statute of limitations, if a party establish in himself, or in connection with those under whom he claims, an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disability, acquires a title to the land; and this, irrespective of any question of motive or of mistake."

The court further say: "The charge of the court below would seem to imply that the statute for the limitation of actions for the recovery of real estate was intended only for the protection of parties who appropriate to themselves the lands of others, knowing them to be the lands of others, *and to exclude from its benefits a party who has honestly entered and held possession of land in the full belief that it was his own.*"

The court again says, in the same opinion, "If he intends a wrongful disseisin, his actual possession for fifteen years gives him a title; or, if he occupies what he believes to be his own, a similar possession gives him title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor."

The author of the article in your journal will find a similar line of decisions in Connecticut, and it would be well for him to present the entire question, rather than a part of it.

D. J. CABLE.

Lima, Ohio, Feb. 19, 1891.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE — Conditions—Waiver. — A provision in an accident policy that none of its condi-

tions can be waived by any agent of the company is valid, and a condition that the insurance does not cover a death resulting from intoxication is not waived because the agent who received and filled out the application knew that the applicant was an intemperate man, though the application stated that his habits were correct and temperate.—*Cook v. Standard Life & Acc. Ins. Co.*, Mich., 47 N. W. Rep. 568.

2. ACTION FOR TORT—Exemptions.—A complaint alleged that, plaintiff's shoulder having been dislocated, defendant, being a practicing physician, "undertook faithfully, skillfully, and diligently to treat and set, and endeavor to cure," the shoulder, but conducted himself so negligently that it was permitted to remain out of place, until it became impossible properly to set and cure it: *Held*, that the complaint is for the tort, and defendant is not entitled to any exemption on an execution issued on a judgment rendered therein.—*De Hart v. Haun*, Ind., 26 N. E. Rep. 61.

3. ADMINISTRATION—Allowances.—Code Miss. § 1279, providing for certain allowances to the widow and children of a deceased person, applies only to families residing in the State.—*Barber v. Ellis*, Miss., 8 South. Rep. 390.

4. ADOPTION—Abandoned Child.—Under our statute providing for the adoption of children, the written consent of parents is requisite, as well when the child is under the age of 14 years, as afterwards.—*Winans v. Luppie*, N. J., 20 Atl. Rep. 969.

5. APPEAL—Foreign Corporations.—When a bill in foreclosure by a foreign corporation, for a loan made in this State, does not aver that it has a known place of business and an authorized agent here, as required by the constitutional and statutory provisions, and is not in any way attacked upon this ground at the trial, the question cannot be raised on appeal.—*Guin v. New England Mortgage Security Co.*, Ala., 8 South. Rep. 388.

6. APPEAL BOND—Waiver.—Under the direct provisions of Code Civil Proc. Cal. § 940, an appeal is "ineffectual for any purpose" where, within five days after service of notice of appeal, an undertaking is not filed or waived.—*Perkins v. Cooper*, Cal., 25 Pac. Rep. 411.

7. ASSAULT—Civil Liability.—In an action for damages for an assault, when only the general issue of "not guilty" is pleaded, but the assault is admitted at the trial, evidence that plaintiff provoked the assault by insulting language and threatening acts cannot be considered for the purpose of entirely defeating a recovery.—*Lundsford v. Walker*, Ala., 8 South. Rep. 386.

8. ATTACHMENT—Forthcoming Bond.—A bond that goods attached shall be forthcoming and subject to the order of the court, does not release the lien of the attachment, and the sureties are liable though the ground on which the writ issued was not proved, and the attachment was sustained on another ground, set up by an amended affidavit filed after the sureties had sold the goods and applied the proceeds on a debt due them.—*Hobson v. Hall*, Ky., 14 S. W. Rep. 958.

9. BILL OF EXCEPTIONS—By-standers.—Under Rev. St. Mo. 1889, § 2170, providing that where the judge refuses to allow a bill of exceptions, it may be signed by "three by-standers, who are respectable inhabitants of the State," an attorney employed in the case is not a competent signer.—*State v. Jones*, Mo., 14 S. W. Rep. 946.

10. BOND—Voluntary—Enforcement.—As a general rule, a voluntary obligation founded upon a valid consideration is enforceable according to its terms and provisions, unless the same be against public policy, or forbidden by statute.—*Abbott v. Williams*, Colo., 25 Pac. Rep. 450.

11. CONSTITUTIONAL LAW—Dealing in Futures—Taxation.—Acts Ga. 1888, p. 22, taxing the business of buying and selling "futures" is not a violation of the interstate commerce clause of the constitution of the United States.—*Alexander v. State*, Ga., 12 S. E. Rep. 408.

12. CONSTITUTIONAL LAW—Oleomargarine—Original Packages.—One who sells oleomargarine in the original package, as imported into the State, from another State, is not subject to arrest under a law of the State in which the sale occurs entirely forbidding the sale of oleomargarine, as such statute is an unconstitutional interference with interstate commerce.—*In re Gooch*, U. S. C. (Minn.), 44 Fed. Rep. 276.

13. CONTEMPT—Rule to Show Cause.—Service of a rule to show cause why a party should not be attached for contempt in not obeying a writ of peremptory *mandamus* must be proved to have been made upon the party before the rule will be made absolute.—*State v. Assessors of Taxes of the City of Rahway*, N. J., 20 Atl. Rep. 966.

14. CONTEMPT—Writ of Prohibition.—Under a writ of prohibition to a judge enjoining him from interfering with petitioners' possession of certain property, either through a certain receiver appointed by him or otherwise, the judge is guilty of contempt if the receiver acts in violation of the writ, and the judge, with knowledge of the receiver's proceedings, refrains from exercising his power to control them.—*Havemeyer v. Superior Court of the City and County of San Francisco*, Cal., 25 Pac. Rep. 433.

15. CONTRACT.—Plaintiffs sold defendants milk-cans, with an agreement that defendant should have the exclusive use of the patented invention of said cans within a certain territory, where such use did not conflict with the rights of the C and P creameries: *Held*, in an action on a note given in payment, that an agreement to exclude the H creamery from using said patent cans within the territory named, not having been embraced in the writing between the parties, failure to perform such agreement is no defense.—*Davis v. Davis*, Mich., 47 N. W. Rep. 555.

16. CONTRACT—Damages.—Where plaintiff has bought land, and made improvements on it, and bought lumber, and hauled it on the land for the erection of a building, the measure of damages for a breach of contract to convey the land is the value of the land, including improvements made by plaintiff at the time of the breach, less the price plaintiff was to pay, together with any special damages in the purchase of the lumber.—*Cade v. Brown*, Wash., 25 Pac., Rep. 457.

17. CONTRACT—Waiver.—Defendant contracted to buy all the lumber manufactured by plaintiff during a certain season; the lumber to be of the sizes usually required for market, to be designated by plaintiff, subject to the right of defendant to give orders for any sizes usually cut: *Held*, in an action for breach of the contract that defendant could not set up as a reason for refusing to receive more lumber, any objection to the size of lumber theretofore accepted and paid for by him without reserving the right to object to it subsequently, and which he retained without any offer to return it.—*Guernsey v. West Coast Lumber Co.*, Cal., 25 Pac. Rep. 414.

18. CONTRACT—Parol—Memorandum.—Where, at the time parties enter into a parol contract, a memorandum is read containing the terms thereof, which are assented to by the parties except in two particulars, such memorandum becomes a part of the transaction, and in an action on the contract the same is competent evidence as a part of *res gestæ*, and may be considered by the jury for the purpose of assisting them to determine what the terms of the contract were.—*Humphrey v. Chilcat Canning Co.*, Oreg., 25 Pac. Rep. 389.

19. CONTRACT—Rescission.—The oral representations of a person, in selling property, that a certain railroad in the neighborhood would be permanently operated, if amounting to an engagement that it should be permanently operated, are no ground for rescinding the sale, as such agreement is void, as within the statute of frauds.—*Bradfield v. Elyton Land Co.*, Ala., 8 South. Rep 383.

20. CORPORATIONS—Doing Business within State.—A single purchase of machinery within the State by a foreign mining corporation, to be transported to and set up in the State of its domicile, is not within the inhibition of Gen. St. Colo. § 260, which prohibits foreign

corporations from doing business within the State until they have filed with the secretary of State a certificate designating their principal place of business within the State, and appointing an agent upon whom process may be served.—*Colorado Iron-Works v. Sierra Grande Min. Co.*, Colo., 25 Pac. Rep. 325.

21. CORPORATIONS—Preferences to Directors.—Where a corporation, while still a going concern, is insolvent, a mortgage on its property, executed to secure the directors, who are liable as indorsers for it to a large amount, is invalid as to general creditors, and that though the mortgage was procured by the directors, without any actual fraudulent intent.—*Howe, Brown & Co. v. Sanford Fork & Tool Co.*, U. S. C. C. (Ind.), 44 Fed. Rep. 231.

22. COUNTIES—Defective Bridges.—Under Rev. St. Ind. 1881, § 3161, the fact that the county built a bridge within a city and contracted for its repair, and employed a superintendent to see that the work was properly done, does not make the county liable to one who, while crossing the bridge at night, falls into a hole made by the contractor, and by him negligently left unguarded.—*Spicer v. Board Com'rs Elkhart County*, Ind., 26 N. E. Rep. 58.

23. COURTS—Jurisdiction.—When judicial tribunals have no jurisdiction of the subject-matter on which they assume to act, their proceedings are absolutely void; but, when they have jurisdiction of the subject-matter, irregularities or illegality in their proceedings does not render them absolutely void, though they may be avoided by timely and proper objection.—*Town of Wayne v. Caldwell*, S. Dak., 47 N. W. Rep. 547.

24. COVENANT OF WARRANTY.—A covenant of warranty of title runs with the land, and passes to a subsequent vendee purchasing at a judicial sale without covenants, and he can sue for a breach thereof by the covenantor. —*Thomas v. Bland*, Ky., 14 S. W. Rep. 955.

25. CRIMINAL EVIDENCE—Larceny.—In a larceny case, for taking certain personal property from a certain steamer, evidence of admissions made by defendant that at various times he committed larcenies from the steamer, is admissible, where it appears that goods of the character found in defendant's possession were on the vessel at the time of the alleged larceny, that they were stolen therefrom, and that defendant was at that time employed on the vessel.—*Griffin v. State*, Ga., 12 S. E. Rep. 409.

26. CRIMINAL LAW—Assault with Intent to Kill.—*Held* under the facts that the court properly refused to charge on the law of self-defense, there being no evidence tending to show that defendant's life was in danger, or that he had reasonable grounds to believe that it was in danger.—*Workman v. Commonwealth*, Ky., 14 S. W. Rep. 952.

27. CRIMINAL LAW—Homicide.—Under the facts the failure to instruct on the law of manslaughter was not error.—*State v. Howard*, Mo., 14 S. W. Rep. 937.

28. CRIMINAL LAW—Homicide—Instructions.—An instruction that when defendant, charged with murder, pleads self-defense, the burden is on him to show an impending danger, etc., "from which there was no other probable means of escape," does not imply the duty of flight, where it would increase the peril, and is not erroneous.—*Hammil v. State*, Ala., 8 South. Rep. 380.

29. CRIMINAL PRACTICE—Arson.—Under Code Wash. Ter. § 823, as amended by Sess. Laws 1885, 1886, an indictment for burning a dwelling house which alleged that it was the property of a certain person, and did not allege that it was used and occupied as a place of abode by anybody was sufficient.—*McClaine v. Territory*, Wash., 25 Pac. Rep. 453.

30. CRIMINAL PRACTICE—Burglary—Information—Instruction.—Under Code Wash. T. § 828, providing that "every person who shall be guilty of any such unlawful entry or unlawful breaking and entry, as described in the next preceding section, shall be deemed to have made such entry, or breaking and entry, with intent to commit a misdemeanor or a felony, unless such entry, or breaking and entry, shall be explained by testimony satisfactory to the jury * * * to have been made for some purpose without criminal intent," it is unnecessary for the prosecution to show the intent of the entry.—*Linbeck v. State*, Wash., 25 Pac. Rep. 452.

31. CRIMINAL PRACTICE—Gaming.—Code Wash. §§ 1253, 1256, 1258, state with sufficient clearness that the act of dealing faro to, or suffering or permitting the same to be done on one's premises is a crime.—*Foster v. State*, Wash., 25 Pac. Rep. 459.

32. CRIMINAL PRACTICE—Names of Witnesses.—The statute (section 7236, Comp. Laws) requiring the names of the witnesses, upon whose evidence the indictment is found, to be inserted at the foot of it, or to be indorsed upon it, is mandatory.—*State v. Stevens*, S. Dak., 47 N. W. Rep. 546.

33. CRIMINAL PRACTICE—Waiver of Jury.—On a trial for a misdemeanor, defendant's waiver of arraignment and a jury trial recited that he "waives arraignment and a trial by jury, pleads not guilty, and puts himself upon the country." Defendant then appeared, and went to trial without a jury: *Held*, that the words "puts himself upon the country," contained in the printed form on which the waiver was written, and which through inadvertence were not erased, were mere surplusage.—*Logan v. State*, Ga., 12 S. E. Rep. 406.

34. DECREE—Misdescription.—A decree in an action to correct an erroneous description in a deed is not void because it misdescribes the premises, where reference is made therein to conveyance containing a good description.—*Thain v. Rudisill*, Ind., 26 N. E. Rep. 46.

35. DEDICATION—Map or Plat.—In order to constitute a dedication by parol, there must be some acts proved evincing a clear intention to dedicate the land to the public use.—*Hogue v. City of Albina*, Oreg., 25 Pac. Rep. 386.

36. DEDICATION TO PUBLIC USE—Alienation.—Land having been conveyed to the inhabitants of a town "for the establishment of a public school," "provided that it shall forever remain affected and appropriated to the public use intended," the town has no power to convey it to the regents of a State normal schools, applicants for admission to which are required to sign a declaration of intention to teach in the public schools of the State.—*Board Regents Normal School Dist. No. 3 v. Painter*, Mo., 14 S. W. Rep. 938.

37. DEED—Description.—Where the description in a deed is not clear and intelligible, the situation of the parties, and the circumstances surrounding the transaction, may be considered in connection with its provisions to ascertain the intention, and give it practical effect.—*Wills v. Leverich*, Oreg., 25 Pac. Rep. 698.

38. DEED—Registration.—The mere delivery of a deed to a county auditor for record is not constructive notice to a *bona fide* purchaser, where the auditor neglects to record the same, in accordance with the registry law.—*Ritchie v. Griffiths*, Wash., 25 Pac. Rep. 341.

39. DEED—Reservation.—The owners of land conveyed a part of it to plaintiff, with a reservation to them and their assigns of "the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances," and the right to do whatever was necessary to obtain and transport such minerals. The rest of the original tract was conveyed in parcels to other persons, with the same reservation, and finally the reserved rights and interests in the whole were granted to defendants: *Held*, that defendants have no right to the possession of plaintiff's land further than is necessary to the exercise of the rights reserved in that tract alone.—*Deitz v. Mission Transfer Co.*, Cal., 25 Pac. Rep. 423.

40. DEPOSITIONS DE BENE ESSE—Filing.—A deposition *de bene esse*, taken on interrogatories propounded by both parties, is not under the control of the one at whose instance it was taken, and, if at his request, the commissioner withholds the deposition, an order will issue requiring its return, the court having no discretion to refuse the order because the party was sur-

prised by the testimony given.—*First Nat. Bank of Grand Haven v. Forest*, U. S. C. C. (Iowa), 44 Fed. Rep. 246.

41. EQUITY—Accounting.—From time to time complainant forwarded lump sums of money to defendant, and to these were added the amounts paid in on the principal and interest of loans already made, and the fund thus created was intrusted to defendant to be loaned on improved farms. Defendant was forbidden to make loans in certain localities and on certain kinds of lands. These instructions having been violated, complainant tendered to defendant the notes and mortgages which represented the loans improperly made, and demanded a settlement of the account: *Held*, that complainant was entitled to an accounting in equity.—*Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co.*, U. S. C. C. (Iowa), 44 Fed. Rep. 219.

42. EVIDENCE—Contents of Letter.—One of the plaintiffs having stated that he had no personal knowledge that certain communications addressed to defendants were mailed except that copies thereof appeared in plaintiffs' copy-book, and that it was a general custom of their firm to place letters in a box in the store from which they were taken to the post-office, there was no foundation laid for the introduction of secondary evidence as to the contents.—*Ford v. Cunningham*, Cal., 25 Pac. Rep. 403.

43. EVIDENCE—Document.—While books of account kept by a party, or known by him to be correct, may be used by him as memoranda for the purpose of refreshing his memory, this question must be kept distinct from the question under what circumstances books of account, shown to have been correctly kept, are admissible as original evidence.—*Friendly v. Lee*, Oreg., 25 Pac. Rep. 396.

44. EVIDENCE—Hearsay.—Declarations of a father, in the absence of his son, that he had given certain notes to him, are admissible after the father's death in a suit by the son on a note executed to him in renewal of those referred to in the declaration.—*Dean v. Wilkerson*, Ind., 26 N. E. Rep. 55.

45. EVIDENCE—Misconduct of Jury.—It was error to permit plaintiff to be asked, on cross-examination, whether the verdict rendered was the verdict that he agreed to in the jury-room.—*Welch v. Tribune Pub. Co.*, Mich., 47 N. W. Rep. 562.

46. EXEMPTIONS—Insolvency.—A safe used by a jeweler and watch repairer should be set off to him in insolvency proceedings as exempt under Code Civil Proc. Cal. § 690, subd. 4, exempting from execution "the tools or implements of a mechanic or artisan necessary to carry on his trade."—*In re McManus' Estate*, Cal., 25 Pac. Rep. 413.

47. FEDERAL COURTS—Admission of New States.—Transfer from Territorial Courts.—The provisions of the general statute regulating the removal of causes from State to federal courts have no application to transfers made under Act Cong. Feb. 22, 1889, under which the State of Montana was admitted to the union.—*Strasburger v. Beecher*, U. S. C. C. (Mont.), 44 Fed. Rep. 209.

48. FORCIBLE ENTRY AND DETAINER.—In an action of forcible entry and detainer, it is sufficient for the affidavit and warrant to state that defendants forcibly entered and forcibly detained the premises, without setting out the nature of the force used.—*McAlpin v. Purse*, Ga., 12 S. E. Rep. 412.

49. FRAUDS, STATUTE OF—Partnership.—A valid contract of partnership for the purpose of speculating in real estate may be made by parol.—*Flower v. Barnekoff*, Oreg., 25 Pac. Rep. 370.

50. FRAUDULENT CONVEYANCES—Evidence.—Where a chattel mortgage given by a husband to his wife is on a valuable consideration, the fact that other transfers of property made by the mortgagor about the same time were intended to defaud creditors, and that the mortgagor remained in possession of the mortgaged chattels, selling them in the usual course of business, this being done under an express agreement in the mortgage that he should account to the mortgagee for the proceeds of sales made, do not show as matter of law, that the mortgage was fraudulent.—*Spaulding v. Keyes*, N. Y., 26 N. E. Rep. 15.

51. FRAUDULENT CONVEYANCES—Gifts.—A gift of land by a father to his son is not void as against creditors of the father, unless the latter had not, at the time of the gift, sufficient property subject to execution to satisfy his debts.—*Windhaus v. Bootz*, Cal., 25 Pac. Rep. 404.

52. FRAUDULENT CONVEYANCES — Insolvent Corporation.—A mortgage executed by a corporation to secure a pre-existing debt is not necessarily invalid for the reason that the company was known to be insolvent, where the company is at the time in the possession of its property, and in the active prosecution of its business, and intends to continue therein, unless prevented by other creditors; and the object of the mortgage is, on its part, not to give a preference to one creditor over another, but simply to obtain an extension of credit.—*Damarin v. Huron Iron Co.*, Ohio, 26 N. E. Rep. 37.

53. GAMING—Money Loaned.—By St. 9 Anne, ch. 14, which is in force in Maryland, a note together with a judgment recovered thereon are void, when a part of the consideration was for money loaned for gambling purposes, and execution will be enjoined.—*Emerson v. Townsend*, Md., 20 Atl. Rep. 984.

54. GAMING—Presumptions.—Under a statute permitting the destruction of gambling apparatus seized and held as evidence, on the conviction of defendant, where the record is silent as to how the apparatus came into the sheriff's hands, it cannot be presumed that such possession was wrongful.—*Way v. State*, Wash., 25 Pac. Rep. 461.

55. GARNISHMENT—What Subject to.—Where an assignee for the benefit of creditors is removed by the chancery court for failure to give bond, as required by Code Ala. § 3549, *et seq.*, and another assignee is appointed under § 3552, the amount in the hands of the latter which the former assignee is entitled to claim as compensation for services rendered in the matter of the assignment is subject to garnishment.—*Stuckey v. McKibbon*, Ala., 8 South. Rep. 379.

56. GUARDIAN.—An application for the confirmation or appointment of a tutor by nature cannot be allowed in the absence of a showing that the certificate of the clerk of court establishing the amount of the minor's property has been recorded in the mortgage book of the mortgage office of the applicant's residence.—*Succession of Arlaud*, La., 8 South. Rep. 389.

57. HABEAS CORPUS—Practice.—Under Enabling Act Wash. § 24, and Act Wash. Dec. 13, 1889, continuing all laws in force applicable to the State government, and substituting the word "State" for "territory," the provisions of Code Wash. ch. 58, in regard to *habeas corpus*, apply to the supreme court of the State.—*In re Rafferty*, Wash., 25 Pac. Rep. 465.

58. HOMESTEAD — Grandchildren. — The term "children" in Code Miss. 1880, § 1277, does not include grandchildren, who, though they have always been supported by decedent as part of his family, cannot claim the homestead as against his second wife, who has a place of her own, equal in value to the homestead.—*Peeler v. Peeler*, Miss., 8 South. Rep. 392.

59. INJUNCTION—Decree.—Where an order of injunction forms part of a decree rendered in regular course, upon issue joined by answer, the parties to the suit are bound to take notice thereof, without being served with a certified copy of the decree.—*Hawkins v. State*, Ind., 26 N. E. Rep. 43.

60. INSURANCE — Proof of Loss—Waiver.—If the adjuster's conduct would induce an honest belief that the proofs then being made were all the company required, and the insured did so believe, the jury might find that formal proofs were waived.—*Gristock v. Royal Ins. Co.*, Mich., 47 N. W. Rep. 549.

61. INTERPLEADER.—When two or more persons sev-

erally claim the same thing, debt or duty from the party liable therefor, such party may maintain a suit in equity to compel such prrties to litigate the title thereto between themselves.—*Pope v. Ames*, Oreg., 25 Pac. Rep. 393.

62. JUDICIAL SALE—Redemption.—Under Rev. St. Ill. ch. 77, § 18, a bill to redeem which does not allege that the complainant has paid or tendered the redemption money to any one authorized to receive it is demurrable, even though the sale was made under a decree directing a sale without redemption, since the right to redeem and the mode of doing so are governed solely by the statute.—*Hyman v. Bogue*, Ill., 26 N. E. Rep. 40.

63. JUSTICES OF THE PEACE — Pleading.— Before a justice of the peace, a statement of plaintiff's claim as follows, is sufficient: "1884. H. B. to J. W., Dr. To amount due for digging well, $60."— *Weese v. Brown*, Mo., 14 S. W. Rep. 945.

64. MASTER AND SERVANT—Exemplary Damages.—Exemplary damages may be awarded againt a master, though the wrong complained of was the act of his servant, not authorized nor ratified by him.—*Fell v. Northern Pac. R. Co.*, U. S. C. C. (N. Dak.), 44 Fed. Rep. 248.

65. MASTER AND SERVANT—Unsafe Machinery.—Under the facts, the rule that an employee accepts the extraordinary as well as the ordinary risks of his employment, when he continues in it knowing of defects which creates unusual dangers, does not apply unless the company has failed for an unreasonable time to make the repairs, etc.—*Lyttle v. Chicago & W. M. Ry. Co.*, Mich., 47 N. W. Rep. 571.

66. MASTER AND SERVANT— When Relation Exists.— The owner of a cargo of coal hired plaintiff to assist in unloading it, and also hired of defendants a pair of mules and a driver to be used in raising the coal from the hold of the vessel. Said owner was to have full control of the mules and the driver, and might put the driver at any other work. And, although he paid defendants for the hire of the mules and driver, he had the right under his contract of hiring to discharge the driver, and appoint a substitute: *Held*, in an action for personal injuries occasioned by the driver's careless management of the mules, that in said work the driver was not the servant of defendants, but of the coal owner.—*Brown v. Smith*, Ga., 12 S. E. Rep. 411.

67. MECHANIC'S LIEN.—In an action to enforce a mechanic's lien, defendant may deny, on information and belief, the recording of the notice of the lien.—*Cowie v. Ahrenstedt*, Wash., 25 Pac. Rep. 458.

68. MECHANIC'S LIEN—Description.—A notice of claim of mechanic's lien describing the land on which the building is situate as a certain lot specifically bounded "excepting a space of 22 feet, more or less, wide on Pike street, by about 25 feet deep," is insufficient, because too indefinite, it not appearing where, in the larger piece, this excepted smaller piece is located.—*Kellogg v. Littell & Smythe Manuf'g Co.*, Wash., 25 Pac. Rep. 461.

69. MORTGAGE — Foreclosure.— On foreclosure of a mortgage given by a riparian owner, covering the shore, and including the land lying under water in front of the upland, which was afterwards leased from the State, and improved by filling below high water mark, before the sale is ordered the rights of the mortgagee in the land that was submerged at the time the mortgage was given, and has since been reclaimed, should be defined.—*Point Breeze Ferry & Imp. Co. v. Bragaw*, N. J., 20 Atl. Rep. 967.

70. MORTGAGE.—In an action to foreclose a mortgage, where the notes and mortgage set out in the complaint show that they were made to plaintiff as "trustee of the estate of W, deceased," an averment in the complaint that plaintiff sues as "trustee for the heirs at law of W" is immaterial and redundant, and must be disregarded.—*White v. Allatt*, Cal., 25 Pac. Rep. 420.

71. MUNICIPAL CORPORATIONS—Highways.—If a municipal corporation is invested with full power to lay out and open streets, its authority is exclusive, and no other tribunal can assume jurisdiction within the corporate limits.—*Cherry v. Board of Commissioners of Town of Keyport*, N. J., 20 Atl. Rep. 970.

72. MUNICIPAL CORPORATIONS—Indebtedness—Bonds. *Held*, that an election for funding the municipal indebtedness providing for the issuing of bonds should be called by ordinance, though section 3419, which provides for the funding of municipal indebtedness, does not expressly declare that the submission of such question to the voters shall be by ordinance.—*National Bank of Commerce v. Town of Grenada*, U. S. C. C. (Colo.), 44 Fed. Rep. 262.

73. MUNICIPAL CORPORATIONS — Ordinances — Fire Limits.—Under the charter of Olympia the city has implied power to pass an ordinance creating fire limits, and prohibiting the erection of any wooden buildings therein.—*City of Olympia v. Mann*, Wash., 25 Pac. Rep. 337.

74. MUNICIPAL CORPORATIONS—Public Improvements. —The determination of a township board that a majority of the property holders have signed a petition for a local improvement is not conclusive, and, in the absence of any statutory provision to the contrary, the question may be investigated in a collateral proceeding.—*Auditor-General v. Fisher*, Mich., 47 N. W. Rep. 574.

75. MUTUAL BENEFIT INSURANCE — Beneficiary.— A provision in a certificate of membership in a mutual benefit association, empowering the member to change the beneficiary by "writing filed with the association," is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate, and an indorsement by the secretary on the certificate making the change.—*Bowman v. Moore*, Cal., 25 Pac. Rep. 409.

76. NEGLIGENCE—Evidence.—In an action for an injury to a switchman while coupling cars by having his foot caught by switch-rails between which the blocking had been worn away by use, evidence irrelevant that within 24 hours the block was replaced by a new one, and its admission cannot be rejected as harmless error.—*Alcorn v. Chicago & A. R. Co.*, Mo., 14 S. W. Rep. 943.

77. NEGLIGENCE—Proximate Cause.—Where a woman was thrown and injured by her horse taking fright at a hand-car, which, two minutes before, and while she was approaching in full view of the section-men, had been left by them standing ten feet from the center of the highway, the evidence of negligence proximately causing the injury is sufficient to sustain a verdict against the company.—*Ohio & M. R. Co. v. Trowbridge*, Ind., 26 N. E. Rep. 64.

78. NEGOTIABLE INSTRUMENT—Indorsement.—One who becomes a party to a note by indorsing the same before delivery to the payee identified himself with the maker; and a settlement of a pre-existing debt owing from the maker to the payee is a sufficient consideration to uphold, not only the note, but also the contract of indorsement.—*Wilkie v. Chandon*, Wash., 25 Pac. Rep. 464.

79. NEW TRIAL—Practice.—Under Rev. St. Ind. 1881, § 561, declaring that a motion for a new trial may be made either before or after judgment, provided it be made and filed at the term at which the verdict or "decision is rendered, it is proper to move for a new trial immediately after a finding of facts by the court.—*Herkimer v. McGregor*, Ind., 26 N. E. Rep. 74.

80. PARTNERSHIP—Accounting.—Where, by the terms of a partnership, the profits are to be divided equally among the partners, the fact that one of them has invested more capital, or has to his credit a larger sum than his other partners, affords no reason for making him pay a greater proportion of the taxes than his copartners, and, in the absence of a special agreement that one shall pay more than the other, the amount of taxes paid must be debited to the partnership.—*Meguiar v. Helm*, Ky., 14 S. W. Rep. 949.

81. PARTNERSHIP—Retiring Partner.—An agreement

between partners upon dissolution of the firm that the retiring partner shall not be liable for the previous firm debts, which shall be paid by the one continuing the business, does not relieve the retiring partner from liability to the firm creditors unless they assent to the arrangement.—*Wadhams v. Page*, Wash., 25 Pac. Rep. 462.

82. PRACTICE—Change of Venue.—The court of common pleas of Cape Girardeau county can transfer a cause to another county on an application for a change of venue based on the prejudice of the inhabitants of the county; Laws Mo. 1861, p. 517, § 1, providing that changes of venue may be awarded in civil cases in that court for like causes, and with like effect, as provided by act approved November 19, 1855, which provided that, when in a civil case in any circuit court the inhabitants of the county were prejudiced against the applicant, a change of venue should be awarded to some court "where the causes complained of do not exist."—*State v. O'Bryan*, Mo., 14 S. W. Rep. 933.

83. PRESUMPTION—Passenger.—A person who, when a train is about to start, passes from a railroad depot across the steps of a sleeper, and goes forward on the opposite side, and gets upon the platform of a mail-car situated several cars from the passenger coaches will not be presumed to be a passenger.—*People v. Douglass*, Cal., 25 Pac. Rep. 417.

84. PRINCIPAL AND SURETY—Estoppel.—Where a tax collector, who is elected for two terms, and gives different bonds with different sureties for each term, defaults during the first year of the first term, and afterwards applies the taxes of each succeeding year to pay the default of the previous year, the sureties on the second bond are not estopped from denying their liability because some time after the expiration of second term they failed to make any immediate protest or objection.—*Metts v. State*, Miss., 8 South. Rep. 890.

85. PROBATE COURT—Jurisdiction.—The probate court has no jurisdiction of a suit to determine the right to real estate as between the administrator of an estate and the husband of decedent, who sets up an adverse claim.—*Stewart v. Lohr*, Wash., 25 Pac. Rep. 457.

86. QUIETING TITLE.—In an action to quiet title, there is no error in excluding plaintiff's evidence that his grantor had declared a homestead on the property, though defendant claims title through an execution sale under a judgment against said grantor.—*Winter v. McMillan*, Cal., 25 Pac. Rep. 407.

87. RAILROAD COMPANIES—Accident at Crossings.—Failure to discuss in the briefs an assignment of error as to the sufficiency of the special verdict is a waiver of the assignment. Where the presence of a three year old child on a railroad track at a public street crossing is not attributable to the negligence of its parents, the railroad company is liable for injuries sustained by the child from being run over by a detached car while its employees were making a running switch without taking any precaution to avoid injuries to travelers on the crossing.—*Louisville, N. A. & C. Ry. Co. v. Schmidt*, Ind., 26 N. E. Rep. 45.

88. RAILROAD COMPANIES—Consolidation.—Laws N. Y. 1869, ch. 917, § 5, authorizing the consolidation of railroad companies, and providing that all debts and liabilities of either company, except mortgages, shall attach to the new corporation, and be enforced against it and its property to the same extent as if created by it, allow an action against the new company on bonds and coupons of one of the former companies, though they are secured by a mortgage on the property of the original debtor corporation.—*Polhemus v. Fitchburg R. Co.*, N. Y., 26 N. E. Rep. 31.

89. RAILROAD COMPANIES—Construction of Road.—A deed to a railroad company conveying the fee in a public highway, for a right of way and other land, in which the grantee covenants to restore and reconstruct the highway on the other land, is not against public policy, as the railway acquires its right to use the highway not from the deed, but from the general railroad act.—*Post v. West Shore & B. Ry. Co.*, N. Y., 26 N. E. Rep. 7.

90. RAILROAD COMPANIES—Construction of Road.—Act N. Y. 1860, ch. 10, prohibiting the building of any railroad "in, upon, or along any of the streets or avenues of the city of New York," applies to and prohibits the building of a railroad across the streets of that city.—*In re People's Rapid Transit Co. v. Dash*, N. Y., 26 N. E. Rep. 25.

91. RAILROAD COMPANIES—Leases.—A lessor of a railroad is not liable for damages to land adjacent to the railroad land, caused by the washing thereon of earth and sand from an embankment erected by the lessee in filling in a trestle, where the lessor was not bound to build such embankment, and there is no evidence that the trestle was not sufficient at the time of the lease, or that it was then a nuisance, though the lessor was bound by the lease to pay the lessee for any work chargeable to construction.—*Miller v. New York, L. & W. R. Co.*, N. Y., 26 N. E. Rep. 35.

92. REAL ESTATE AGENTS—Authority to Sell.—A real estate agent authorized to "sell" land has thereby no authority to execute a contract of sale.—*Carstens v. McReavy*, Wash., 25 Pac. Rep. 471.

93. REPLEVIN—Goods in Custody of United States Marshal.—Goods in the custody of a United States marshal, under attachment issued from a federal court, may be replevied by suit in a State court, by consent of the federal court.—*Hill v. Corcoran*, Colo., 25 Pac. Rep. 171.

94. RES ADJUDICATA—Award.—An action for deceit against the agents of a corporation is not barred by an award against the corporation on the same cause of action, though the amount awarded has been tendered, and the tender kept good by payment into court.—*Baltes v. Bass Foundry & Machine Works*, Ind., 26 N. E. Rep. 59.

95. RES ADJUDICATA.—Under Code Civil Proc. Cal. § 1246, where one takes a written lease of land with notice of the pendency of an action to condemn it, and then fails to appear and defend his interest, he is estopped by the judgment in that proceeding from claiming anything under his lease.—*Drinkhouse v. Spring Valley Water-works*, Cal., 25 Pac. Rep. 420.

96. SALE—Delivery—When Title Passes.—An agent bought for his principals all the ores produced at a mine, to be delivered when loaded on the wagon at the mine. Ores were loaded and delivered to a carrier, consigned to the agent, and a bill of lading to him in his own name was sent him: *Held*, that the title passed to the principals when the ores were delivered to the carrier.—*West v. Humphrey*, Nev., 25 Pac. Rep. 446.

97. SALE—Refusal to Accept.—In an action for goods sold and delivered, if the plaintiff alleges, and proves a delivery at the place agreed, and nothing remains for him to do, he need not show an acceptance by the defendant.—*Schneider v. Oregon Pac. R. Co.*, Oreg., 25 Pac. Rep. 391.

98. SALE—Rescission.—Although the buyers of goods at the time of the purchase were insolvent, and had no intention of paying, and made false representations, still, the sellers not having relied upon the representations or been influenced thereby, the contract cannot be rescinded for fraud.—*Darby v. Krosll*, Ala., 8 South. Rep. 384.

99. SLANDER—Declaration of Co-conspirator.—In an action for slander in charging plaintiff with associating with another in a theft of certain cattle, declarations made by such other after the alleged transactions was completed are inadmissible to show that plaintiff was associated with him.—*Barkly v. Copeland*, Cal., 25 Pac. Rep. 405.

100. SPECIFIC PERFORMANCE—Statute of Frauds.—A parol agreement for the conveyance of land will be enforced when it rests upon a valuable consideration, and possession has been taken under it, and valuable improvements made.—*Swales v. Jackson*, Ind., 26 N. E. Rep. 62.

101. SURVIVAL OF ACTION—Negligence.—Though, when the deceased leaves neither wife nor child no action for loss of life through willful negligence is authorized by Gen. St. Ky. ch. 57, § 8, the right of action which accrues at common law when the injury does not result in instant death, survives to the personal representatives under Gen. St. Ky. ch. 10, § 1.—*Newport News & M. V. R. Co. v. Dentzel's Adm'r*, Ky., 14 S. W. Rep. 958.

102. TAXATION—Assessment.—An assessment of taxes against the property of "The Diamond Valley Live-Stock & Land Company," is not void because made against "The Diamond Valley Stock Company," the company having returned no statement of its property, and its vice-president and general agent having seen the list prepared by the assessor, observed the mistake in the name, and failed to call attention to it.—*State v. Diamond Valley Live-Stock & Land Co.*, Nev., 25 Pac. Rep. 448.

103. TAXATION—Delinquent Lands.—Tax Law Mich. 1889, § 53, which requires a delinquent tax-payer to appear and answer the petition of the auditor general for the sale of the land within 20 days after the return-day of the subpœna directing him so to do, contemplates that all objections to the proceedings of the auditor general, whether they go to the validity of the law or to the proceedings under it, shall be made in writing and filed on or before the day fixed for the hearing of the petition, and no objection not so taken and filed can be allowed.—*Auditor General v. Sloman*, Mich., 47 N. W. Rep. 565.

104. TAX-DEED—Tender.—A tax-deed being sufficient to transfer the State's lien for taxes, the owner of the land cannot sue to set it aside as a cloud on his title, without first tendering and paying into court the purchase money, interest and subsequent taxes paid by the holder of the tax-deed, and it is not sufficient to offer to pay at such time as the court shall require.—*Montgomery v. Trumbo*, Ind., 26 N. E. Rep. 54.

105. TRADE-MARKS—Infringement.—A suit to restrain the use of the name "Rosendale Cement" in the denomination of cement manufactured and sold by defendants, cannot be maintained, though such name is known by the public to mean cement made in Rosendale, and defendants' manufactory is in another State, unless it be shown that complainants have an exclusive ownership or property therein. It is not sufficient that they, in common with certain other persons, have a right to use it, and the public may be deceived by defendants' use of the name.—*New York & R. Cement Co. v. Coplay Cement Co.*, U. S. C. C. (Penn.), 44 Fed. Rep. 277.

106. TRIAL—Findings of Fact.—Under the provisions of Code Wash. T. § 246, the recital in the judgment that "the court finds the matters and things set forth in the complaint are true," etc., cannot take the place of findings; especially where one of the allegations of the complaint is admitted to be untrue by the reply.—*Bard v. Kleeb*, Wash., 25 Pac. Rep. 467.

107. TRUST—Resulting—Fraud.—*Held*, that the complaint does not show facts sufficient to establish a trust on the ground of fraud.—*Schultz v. McLean*, Cal., 25 Pac. Rep. 427.

108. USURY—Contract.—The parties to a usurious contract can do nothing which will have the effect to validate it, so as to deprive the debtor of his right to defend on the ground of usury, except by expunging its usurious element.—*Trusdell v. Dowden*, N. J., 20 Atl. Rep. 972.

109. VENDOR AND VENDEE.—That the contract of sale called for a conveyance "free of all incumbrances" did not require a deed of general warranty against incumbrances, and, if it did, defendant cannot object on that ground, when the deed presented to him was only an ordinary grant deed, and he then made no objection either to the form of the contract or the deed.—*Fiske v. Soule*, Cal., 25 Pac. Rep. 430.

110. VENDOR AND VENDEE—Parol Contract—Adverse Possession.—One who purchases land by parol contract, receives possession, and afterwards pays the purchase money, is presumed to have adverse possession from the date of payment.—*Newsome v. Snow*, Ala., 8 South. Rep. 377.

111. VENDOR AND VENDEE—Record Notice—Estoppel.—At the time P deeded certain land to his wife there was a mortgage thereon securing his individual note. P and his wife then gave a mortgage to secure their joint note. After the wife's death, the mortgages were foreclosed, the first mortgagee becoming the purchaser at the sale under his mortgage, and P becoming the purchaser at the sale under the second mortgage. The first mortgagee afterwards deeded the land to P: *Held*, that the record of the title was not notice to any purchaser from P that in allowing the sale under the mortgages P had committed any fraud on his children.—*Lucas v. Parks*, Mich., 47 N. W. Rep. 450.

112. VENDOR AND VENDEE—Rescission.—In a suit to enforce a vendor's lien defendants alleged false representations as to the validity of the vendors' title, because before the sale to them he had conveyed the land to another person. Defendants had no knowledge of this deed, and it was not acknowledged or proved or filed for record until after the bill was filed in this suit: *Held*, that this deed was of no effect as to defendants, and is no ground for rescinding the sale to them for false representations.—*Meeks v. Garner*, Ala., 8 South. Rep. 378.

113. WATERS AND WATER-COURSES—Diversion.—Under Code Civil Proc. Cal. § 1925, which makes a certificate of purchase of lands, issued under the laws of the United States, primary evidence of title in the holder, a receipt for the purchase money, issued by the receiver of a United States land-office to an occupant of public lands bordering on a stream, is sufficient *prima facie* evidence of title in the latter to enable him to maintain an action to enjoin an upper riparian proprietor from unlawfully diverting the waters of the stream.—*Conklin v. Pacific Imp. Co.*, Cal., 25 Pac. Rep. 399.

114. WILLS—Construction.—A testator directed that all his property should be disposed of—one fourth to the children of each of two deceased sons, one-fourth to his son D, in trust for his children, and one-fourth to his son O, "during his natural life; and, in case he should die, leaving no child or children of his own, then said property to go to my surviving child or grandchildren, in equal parts:" *Held*, that the remainder in O's share vested one-third in D and one-third in the children of each of the deceased sons, subject to being divested by O's leaving a legitimate child or children, in which event the fee would vest in such child or children.—*Kilgore v. Kilgore*, Ind., 26 N. E. Rep. 56.

115. WILLS—Power of Sale.—No limitation of time is imposed upon a power in the nature of a trust, not limited in terms, unless the rule against perpetuities is involved, or the power is controlled by an inherent quality in the nature of the trust, or in the object for which the power was granted.—*Morse v. Hackensack Sav. Bank*, N. J., 20 Atl. Rep. 961.

116. WILLS—Undue Influence—Evidence.—On the contest of a will for undue influence alleged to have been exerted by testatrix's priest, it is within the discretion of the trial judge to decide how far he will permit the contents of a book found in testatrix's library, and containing vivid descriptions of hell, to be exhibited to the jury, where there is nothing to show that the priest furnished the book to testatrix, or what parts of it she had read, or what effect the book had produced on her mind.—*Melanefy v. Morrison*, Mass., 26 N. E. Rep. 36.

117. WITNESS—Transactions with Decedents.—In an action by a creditor of an intestate to compel an accounting by the widow for personal property of decedent converted by her, and the application of the proceeds to the payment of plaintiff's debt, defendant is the "heir" of her husband, within the meaning of Rev. St. Ind. 1881, § 499.—*Larch v. Goodacre*, Ind., 26 N. E. Rep. 49.